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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TWIN FALLS-SALMON RIVER LAND AND WATER COMPANY, a corporation, SALMON RIVER CANAL COMPANY, LIMITED, a corporation, COMMONWEALTH TRUST COMPANY OF PITTSBURG, Trustee, and A. C. ROBINSON, Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. POND, JAMES W. BEAUCHAMP, CARL WASHBURN and HAROLD M. SIMS, in their own behalf and in behalf of all persons similarly situated with them, Appellees.

REPLY BRIEF OF APPELLEES

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STATEMENT OF THE CASE.

A reply brief becomes necessary only because of the many misstatements, inaccuracies and "half-truths" set forth in the supplemental brief of appellant. Such brief also contains numerous statements totally unsupported by the record, and no folio is cited directing our attention to the portion of the record relied upon.

Pursuant to the provisions of our Idaho laws, a certain contract was entered into by the State, on the one hand, and the defendant irrigation company on the other. The laws of the State providing for this contract, the contract actually entered into pursuant to such laws and the contract entered into between the irrigation company and the settlers, should

be looked to for a determination of the rights of the parties to this action. For convenience, we refer to the contract between the State and construction company as the "State" contract; (see Plaintiff's Ex. "A" p. 42 trans.) and the contract between the Construction company and the Settlers as the "settlers" contract; (Ex. "C",p. 62 trans.) although the two contracts become one, and must be construed as such.

Appellant in persistently claiming that no water right was sold, clearly mis-states the provisions of Sec. 1621, Rev. Codes, Idaho. On page 3 of the supplemental brief, in referring to this section, it is said that "the contract must contain complete specification of the works to be built, the cost to the settlers, and the terms on which the state will dispose of its lands." The one provision of this statute which seems to us vital has been omitted. It will be observed that from the quotation one would be justified in concluding that the "works" only were to be sold to the settlers. Sec. 1621, provides:

1. "Contain complete specifications of the location, dimentions, character and estimated cost of the proposed ditch, canal or other irrigation works;"
2. "The price and terms per acre at which such works **and perpetual water rights** shall be sold settlers;"
3. "And the pirce and terms upon which the State is to dispose of the lands to the settlers."

From the foregoing is clearly appears that the contract must provide that in addition to the "works," "perpetual water rights," are sold the settlers.

Equally misleading is the next paragraph on page 3 of supplemental brief. Here we are told that under the Statute, Sec. 1615, "the right of the settler to the water represented by the permit taken out for the entire tract is a proportionate interest therein." This is but half the truth, and in reality deals with the unimportant half.

Under Sec. 1615, a proposal to the State, for the construction of the works, must be made by the person or corporation desiring to proceed under the Carey Act.

The proposal is, as a matter of fact, an offer, which when accepted by the State, requires the execution of the contract provided for by Sec. 1621, and the acceptance of such proposal constitutes the contract between the parties. The proposal, therefore, contains:

1. The source of water supply and general character of irrigation system to be constructed.
2. The price and terms for a "perpetual water right, etc." "said perpetual right to embrace a proportionate interest" in the works of diversion.

This is not as counsel would have it, and not as counsel has stated the statute to be, for the reason, that counsel has stated that the water right was to be proportionate; while the statute says the water right shall be perpetual and shall embrace a proportionate interest in the works.

The reason for this is obvious: The water is divided among the settlers and so received and used according to the crops planted; any division of the works would be impracticable and defeat the object of the act.

Under the theory of counsel the less includes the greater; or, the greater and more important right is ignored if not entirely denied.

The instances cited contain perhaps the mis-statements or misconstrustion of our statutory provisions most important to bear in mind in considering the contracts involved in this litigation.

So many alleged facts are referred to in the brief to which the record gives no support, that it is almost impossible to call these to the attention of the court in detail. Many are of sufficient importance, however, so that the question must be

raised.

For instance, we are told the State Engineer "reported that the water supply was sufficient for the irrigation of 150,000 acres of land." We do not find any such report in the record.

Next, that at the time of the hearing in the Court below, "a very considerable acreage had been forfeited, so that the project had been reduced in area to 57,348 acres." (p.4 arg.) This is untrue, both as to the fact, and the legal result claimed. Mr. Hall, manager and witness for the defendant irrigation company, states: (p. 219 trans.) "Of the 21,711 acres not proved up there were about 16,000 acres on which no cultivation had been made, and on which no one was living, and there were about 5,700 acres which were occupied and farmed, on which people were living, but had not yet made their final proof, but could do so at any time. Eliminating the entries where there has been no cultivation and settlement, the net area of this project is about 57,348 acres." There is a vast difference between the two statements. Failure to make the proof of cultivation under the statute made the entry subject to contest and **re-entry**—assuming Barnum's axiom is still operative; but in any event the water contract and the obligation to furnish water thereunder was still outstanding and by no means forfeited.

The next statement of which we complain is concerning the water supply (p. 5). As heretofore suggested, we do not find anything in the record to support the alleged report of the State Engineer regarding 400,000 acre feet. But the reasoning employed in this paragraph is altogether faulty and misleading for the reason, that reservoir and transmission losses are entirely ignored in the equation. Mr. Darlington, water master for the company, testified (p. 141 trans.) "In 1912 the transmission loss was about 50 per cent.; in 1913, 33 per cent.; in

1914, 27.3 per cent. The reservoir losses for 1912 were 64,181 acre feet (32 per cent.); in 1913, 46,314 acre feet (42 per cent.); in 1914, 38,032 (28 per cent.) acre feet.

Why the brief of appellant should refer and be burdened with special reports of Senate committees, irrigation manuals and treatises, reports of the Land Commissioner and similar matter having no authenticity or binding force or effect as legal precedent is more than we can fathom. At least, we do not feel justified in searching for the writings of others having contrary views, theories or opinions.

ISSUES.

We wish to propose another classification of the issues than the one presented by appellant.

1. Did the settler purchase a water right?
2. Will patent issue from the United States to the lands entered, without the showing being affirmatively made that "an ample supply of water is actually furnished in a substantial ditch or canal?"

The appellant in the supplemental brief for the first time has very nearly permitted himself to go on record upon the proposition of whether the irrigation company did, or did not agree to sell a water right. For on page 4 in stating their position they say, the company "did not enter into any covenant, either temporary or perpetual, whereby it agreed to furnish the water supply claimed during each irrigation season." As usual, counsel has so burdened this statement with qualifications—has left so many loop holes—that it may mean something or noth ing. If counsel means that his company has sold no water right, then we take issue with him. If he means that his company did not sell a water right which would amount to 2.75 acre feet in a season of abnormal, exceptional drought, we would not take exception, although the question is at least de-

batable; if he means no water right was sold which would give the settler 2.75 acre feet in the normal year, or an average of such an amount over a period of years, we will take issue. And likewise, if he means that he has sold a water right to be measured by the proportion of what there is to deliver—be it something or nothing.

Our experience in this case, however, has lead us to conclude that we have no reason to expect a specific statement upon this very vital point.

Of course, counsel knows that the last part of the statement contained in the paragraph at the top of page 5 is not supported by the record and untrue as a matter of fact. It might be urged that because of the making of the contract by the State Land Board, one would have the right to assume that the provisions of the law had been complied with, and that the State Engineer had in fact, examined the water supply; but aside from this assumption the statement is misleading, and as suggested, untrue.

Before taking up the issues hereinbefore suggested, we wish, if possible, to follow the argument of appellant as set forth in the supplemental brief.

Briefly reviewing the position taken by counsel, we gather that his position is in substance: that the Carey Act had for its object the reclamation of the Desert lands of the United States; that the Company undertaking to build the works was simply a Construction Company and received pay only for the cost of the works, and did not covenant or agree to sell or deliver a water right. That in order to accomplish these things, a Construction Company must make a proposal to the State, and again we refer to the statement of counsel, in this connection, because of the evident attempt to eliminate the meat of the section of the statute: "the proposal must state the source of water supply, the location and dimensions of the proposed

works and estimated cost thereof, the price and terms per acre at which perpetual water rights representing a proportionate interest in the irrigation works and water supply will be sold to the settlers'' (p. 11), when as hereinbefore set forth, this is not the provision of the statute at all, and for what reason counsel persistently refuses to correctly quote the provision of the statute, wherein it is provided that the proposal shall contain ''the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual rights to **embrace a** proportionate interest in the canals or other irrigation works,'' is more than we can understand, unless this particular and especial provision in the statute is something counsel cannot and will not meet, explain or overcome.

It appears to be the further contention that this proposal should be considered as a bid for the doing of the work and the ''statute'' may be considered as an advertisement for ''bid.'' Nothing could seem more ridiculous than this statement, if it is to be considered a legal argument. The proposal is nothing short of an offer to do certain things required by the statute, which, if accepted as provided by Section 1619, a contract is then entered into as provided by Section 1621, which, according to the ordinary rules of law, contains all of the terms and conditions of the offer as accepted; thereby showing the meeting of the minds of the contracting parties upon the identical thing to be done and performed.

Reference is made to the fact that there are certain provisions incorporated in the Idaho contracts relating to Carey Act matters in addition to those prescribed by statute, and that, therefore, any matters so incorporated are without any sanction and void. We cannot see precisely the purpose of this statement appearing on page 14.

Another characteristic of appellant's argument, which, but

for the necessity of replying thereto, would amuse us, is the disposition of counsel to make some long quotation from the report of an irrigation engineer, State engineer or alleged specialist in irrigation matters, and then follow it up by the trite saying, "decisions of the Supreme Court of the State of Idaho are to the same effect." We would seem entitled in this case to the statement of the Court in the first instance, because we have the right to assume that if the point has been decided by the Court, it will be tersely stated, and fairly well expressed. At least, we should not be compelled to go outside of the decisions of the Courts to secure our law, if the Courts have passed upon the same matter precisely.

As to why counsel felt called upon to discuss the debates in Congress as to the lien to be fixed in favor of the Construction Company, we are not advised, and do not feel required to enter into a discussion of this matter.

Counsel next advises us that the State Engineer whose duty it is to first investigate the proposal or offer of the Construction Company to enter into a contract for the construction of irrigation works under the Carey Act, being a State officer, his acts in the matter are conclusive upon all persons interested. In other words, we are met with the rather astonishing proposition that if a State Engineer, who may be guilty of gross negligence or actuated by corrupt motives, advises the State Land Board that there is water in a stream sufficient to irrigate a certain project, when there is not, that such action on the part of such a State official is conclusive upon the settler and all other persons concerned, including the United States Government, who may thereafter deal with the matter, under the assumption that the official has properly performed his duty. In other words, that the fraud, corruption or neglect of a State official is conclusive and binding upon all who may have occasion thereafter to deal or become related in any way to the subject mat-

ter. We do not believe this to be the law, and will discuss this later.

We confess our inability to follow the argument of appellant and reply thereto. If the State and Federal laws do not require the settler to have a water right to reclaim his land before he can demand patent, then we will grant that all counsel has said, and that the statements quoted from irrigation engineers are decisive. If, on the other hand, we are required to have a water right, we have not succeeded in getting one unless from the defendant construction company.

We wish, therefore, to discuss the issues as hereinbefore proposed:

DID WE PURCHASE A WATER RIGHT?

The provisions of the Statute supporting our contention that we bought and are, therefore, entitled to receive a water right follow:

The proposal or offer of construction company must contain "the price and terms per acre at which perpetual water rights will be sold settlers;"

Sec. 1615, Rev. Codes.

The "State" contract to be entered into by the State and construction company must contain "the price and terms per acre at which such works and perpetual water rights shall be sold to settlers:"

Sec. 1621, Rev. Codes.

Then under the section giving the construction company a lien for price agreed upon, "any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which water is used" for all payments due under contract.

Sec. 1629, Rev. Codes.

It may be that the Company has not agreed to "furnish

water," and if so, they have no lien for contract price, as the "furnishing water" seems to be a condition precedent to the right to a lien.

Now as to the contracts:

Paragraph 1, "State" contract, (p. 43 trans.) in setting forth the purpose of contract: "to sell shares or water rights in the canal or irrigation system."

According to the authorities cited by appellant, no provision of the contract became binding upon any one, unless authorized by the so-called Carey Act statutes of the State. These statutes clearly provide for the sale of water rights, not shares of stock.

See also "Price of Water Rights." (p. 50 trans.)

It is further agreed that no water right be sold beyond the amount of water appropriated.

State Contract p. 52. Trans.

Of course, if appellants contention be accepted, and the fact of having filed a permit covering sufficient water to supply 2.75 acre feet to the settler, be sufficient and conclusive, regardless of whether there was any water in the stream subject to appropriation, there is nothing further to be said upon this point. But if this is the correct rule, why was such provision put in the contract? Being there, it must be given force and effect if possible. It cannot be said that the provision means that no water rights should be sold in excess of 150,000 acres; because this was the maximum allowed by the contract. Water cannot be "appropriated" unless it be in the stream and subject to diversion. An application to appropriate 1000 sec. feet of the waters of a stream containing but 500 second feet of unappropriated water would be an appropriation of but 500 second feet. And an agreement not to sell more water rights than the amount appropriated, does not present a complex or unusual provision. The situation, however, afforded when one has sold

more water than can be delivered is not without its complex and disagreeable features.

We next turn to the Federal law to ascertain what bearing it may have upon the question proposed.

The provisions of the Act in point are:

1. A right to contract with the State to donate and patent to the State 1,000,000 acres of land which the State may cause to be irrigated, reclaimed and occupied.
2. Before the application of the State is allowed or any contract made for the ultimate reclamation of the lands, or any segregation of the lands ordered, the State must fully disclose how such irrigation and reclamation is to be accomplished.
3. Then if the lands are segregated upon such showing, and not until the segregation has been made, the State is authorized to enter into contracts to cause the lands to be reclaimed, and to induce their settlement in accordance with and subject to the provisions of the act.
4. A lien for the work of reclamation is authorized.
5. "And, when an ample supply of water is actually furnished in a substantial ditch or canal * * * then patents shall issue for the same to such state."

(See p. 4. Res. brief.)

Appellant takes the position that the State Engineer having approved the project, the Department of the Interior having approved the plan and segregated the land and the contract having been entered into, such steps are not only conclusive upon all concerned, but entitle the settler to a patent, regardless of the water supply. In other words, that when the plan was approved and the segregation made, the grant from the United States passed and became on **in praesenti**; and this regardless of performance of the plan so proposed.

The fact that under the Federal law, after the segregation is

made the law provides that the State shall then make a contract for the reclamation of the land is apparently ignored. Also, that by the express provision of the Federal Act, patent does not and will not issue until an ample supply of water has been furnished. Furnished by who? Not by the State, because under the express terms of the State law, the construction company must sell water rights. They must not only agree to sell water rights, but until water has been "furnished" no lien for purchase price is created.

In view of the plain provisions of the Federal law, can it be seriously contended that the grant is one **in praesenti.**

It is true that some State Engineer has so declared it (see appellant's original brief p. 41); but there is authority to the contrary; in the case of McKinney vs. Big Horn Basin Dev. Co., 167 Fed., 770; S. C. 93 C. C. A., 258 (8th Cir.) it was held:

> "The underlying purpose of the acts of Congress in ceding the vast domain of desert lands within the territorial limits of the given states was, through the agency of the state government more immediately concerned, to speedily have them reclaimed from an unproductive waste by means of artificial irrigation. * * *. But Congress did not make the grant to the State of such lands in mass to take effect **in praesenti.** The State was first to furnish satisfactory evidence to the Secretary of the Interior that the lands are irrigated, reclaimed, and occupied by actual settlers before any patent should issue therefor." (The black face type our own.)

This case, in reality disposes of every contention made by appellant. It clearly holds that irrigation, and reclamation are the tests, and that without performance in these respects, no patent will issue.

The fact that lands cannot be irrigated or reclaimed except by water will be conceded by all, we believe, and so, unless the settlers have a water right in addition to an interest in a reservoir and ditches, they have failed in the one respect made vital

by the laws of Congress.

The case is important in another aspect. The Federal law did not give the State the right to enter into a contract for the reclamation of these lands by the sale of shares of stock in an irrigation company which might or might not have water; and it appears from the opinion that any contract entered into by the State not in compliance with and for the furtherance of the declared legislative policy of the Federal government, would be void and of no effect.

The facts are that the settlers upon the Salmon have shares of stock in an irrigation company; but no water right, at least, not the one agreed upon; and it is now the claim of the Company which they are attempting to force upon the settler by various foreclosure suits that no water right was sold, at least, no more than a proportionate interest in what water may be available—be that something or nothing. That the Company only agreed to construct an irrigation system, and this is what they are asking and seeking to enforce pay for.

We again quote from McKinney case:

> "The assertion of such a right flies in the face of a fundamental principle of law, that, where a grant of power under a statute is given for the accomplishment of the state's policy, the due performance of the function by the grantee is the consideration for the public grant; and consequently any contract by the grantee which tends to disable it from performing its entire function by undertaking to transfer to others the discharge thereof, with an effect, different from the grant, is violative of the contract with the state and contrary to public policy."

Citing:

> York vs. Ry., (U. S.), 15 L. Ed., 27;
> Thomas vs. Ry. (U. S.), 25 L. Ed., 950;

and further:

> "Every person dealing with such grantee of a privilege or right must take notice of the limitations placed thereon

by the creative act."

Now assume the State had made a contract which would sustain the contention of appellant in all respects; when the settler comes to the Federal government and asks for a patent and bases the request upon shares of stock in an irrigation company which has no water to deliver its stockholders for the irrigation or reclamation of the lands, a refusal would follow as a matter of course.

Nor can the appellant claim any immunity from the operation of the rule referred to because the State Engineer may have passed upon the sufficiency of the water right, and the Company proceeded to expend vast sums in building an irrigation system.

If there was in fact insufficient water in the source of supply, the approval of the State Engineer did not supply the deficiency, and it was the duty of the contractor.—appellant Land and Water Company—to know that the object and requirements of the legislative grant could be complied with and performed; especially when such company were relying upon the express terms of such grant and are now insisting upon the lien given thereby when water is furnished.

We quote further from the opinion:

> "It is no answer to say that after the original contractor, the appellee, had stood by and permitted the appellant to proceed to incur expense and give his time and labor in execution of the contract, it should now be estopped to deny its accountability under the contract. The answer to this is fully made by Mr. Justice Miller in Thomas vs. Railroad Co., supra: 'It is a contract forbidden by public policy and beyond the power of the defendants to make Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance several years, it was nevertheless a right-

ful act when it was done. Can this performance of a legal duty, a duty both to the stockholders of the company and to the public, give to plaintiff a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can, is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts.' ''

In the McKinney case the vice found by the court was in the fact that the contract did not in express terms fix the price and terms for a water right; but left this optional with the promotor. Can it be said that a contract failing in this statutory requirement would be in any manner different from one which did not sell a water right to the settler?

If the Court should conclude from the foregoing that the settler did in fact, and must, as a matter of law, have purchased a water right, the next question is, how much of a water right did he purchase?

We must abandon the "proportionate" interest theory, at least, as urged by appellants. Because the proportionate interest so contended for might be something or nothing. In any event, it might not be "an ample supply of water in a substantial ditch." So that we must proceed upon the theory that compliance with the requirements of the Federal law was intended. And that, therefore, a "proportionate" interest in an insufficient supply would not comply with the requirements noted.

In this connection it should be observed that the word "proportionate" is employed in the statute in connection with the interest to be owned by the settler in the "canal or other irrigation works." (Sec. 1615, Rev. Codes.) And not in connection with the water.

Reference to the contract between the parties does not, we

concede, afford any easy, simple solution. We are almost tempted to conclude that the contract in question was written by the same hand which drafted the argument for appellant herein. Upon reference to the affidavit upon p. 308 of transcript, the suspicion is in all things confirmed.

We will call the Court's attention to paragraph 4 of the State contract, which is as follows:

"APPROPRIATION OF WATER."

> "The party of the second part is the owner of that certain water right * * * * to be used for the irrigation of the lands described in Exhibit "A" herewith * * * * and it is agreed and understood that the dam hereinbefore mentioned, shall be constructed so as to provide a reservoir for the impounding of 180,000 acre feet of water, which amount, in addition to the normal flow of said stream, during the irrigation period, has been determined to be sufficient to furnish two and three-fourths acre feet of water per acre for each acre of land to be irrigated."

This, we believe, to be the only provision in the State or Settlers contract relating to the amount of water to be furnished the settlers under the project.

Appellant, of course, contends that the amount of water fixed in this paragraph of the contract relates to "capacity" rather than water to be furnished the settlers. In fact, the supplying of capacity is the claimed performance all the way through rather than the actual delivery of any water right.

But we believe it to be pertinent to inquire why any determination of the amount of water to be delivered was necessary unless it was expected that such an amount of water should be actually delivered?

The Federal Government only requires that "an ample supply" be furnished. Why should it not be determined by the State and the Construction Company as to what such ample

supply should be; a standard fixed, in other words? And why was it not important for the State and Construction Company to fix the amount to be delivered in view of the fact that a settler proposing to enter lands under this project and purchase a water right would naturally first inquire as to what water right he should receive?

The amount of water delivered to settlers upon the arid lands of the West is the principle factor in determining the value of such lands, either from the standpoint of production or from any other.

In any event, the State of Idaho on the one hand, and the appellant Company on the other, determined that the water to be impounded, together with the normal flow of the stream, was sufficient to furnish two and three-fourths acre feet of water for each acre of land to be irrigated.

Under the well recognized rules of construction, we should not ignore this clear provision of the contract; but should give it force and effect, if possible. It is, of course, true, that the Federal Government might conclude when proof was ultimately submitted, that the two and three-fourth acre feet so agreed upon would not be the ample supply required to irrigate and reclaim the land; but this is anticipating and not a matter now to be decided. We are safe in saying, however, the Federal Government would not say that too much water was furnished.

Upon this question generally, we have nothing further to suggest at this time than as urged in our original argument, and more especially is this true because of the consideration and analysis given this phase of the case by the learned trial court.

Respectfully submitted.

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